

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:MCT:CLE:PIT:TL-N-603-01
DPLeone

date:

to: Mark H. Sharpnack, Revenue Agent

from: Associate Area Counsel, LM:MCT:CLE:PIT

subject: [REDACTED] - Partnership Statutes
Years: [REDACTED] and [REDACTED]

This is in response to your January 24, 2001 request for advice with respect to the extension of the statute of limitations for certain partnerships. This memorandum is subject to 10-day post review by our National Office and, therefore, is subject to modification.

DISCLOSURE STATEMENT

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ISSUES

1. Who must sign a consent to extend the statute of limitations for a partnership that falls under the small partnership exception, I.R.C. § 6231(a)(1)(B)(i), to the unified partnership audit procedures?

2. If a partner of a partnership that falls under the small partnership exception is a corporate subsidiary that filed a consolidated return, must its common parent sign the consent to extend the statute of limitations as its agent, or must the subsidiary sign the consent?

3. At this time, can a partnership falling under the small partnership exception elect to have the provisions of subchapter C of Chapter 63 of the Internal Revenue Code (the unified partnership audit procedures under TEFRA) apply for the year [REDACTED]?

4. When a partner in a small partnership is a corporate subsidiary of a consolidated group, who should sign the I.R.C. § 6231(a)(1)(B)(ii) election to have the TEFRA audit procedures apply to the partnership?

ANSWERS

1. Generally, each partner must sign a consent to extend the statute of limitations under section 6501(c)(4). This extends the period for assessing their individual liabilities. Since in this case, the section 6501(c)(4) extension will be used to cover taxes attributable to partnership items, it must contain the special language required by section 6229(b)(3) (relating to partnership items).

2. The common parent must sign the section 6501(c)(4) agreement to extend the statute of limitations. The agreement should contain special language (provided in the Discussion section below) to cover the partnership items.

3. Yes. The partnership can elect to have the unified audit procedures under TEFRA apply provided the partners extend the statute of limitations, as discussed in 1. and 2.. above, so as to provide at least one year remaining on the statute.

4. All partners in the partnership, as well as the common parent of any partner which is a subsidiary corporation that filed a consolidated return, should sign the election to have the TEFRA audit procedures apply.

FACTS

There are three partnerships at issue that have statutes of limitations for the [REDACTED] and [REDACTED] taxable years that are currently being protected by Forms 872-P, Consent to Extend the Time to Assess Tax Attributable to Items of a Partnership. It is

our understanding that the Forms 872-P have been executed by the purported Tax Matters Partner, consistent with the provisions of I.R.C. § 6229(b)(1)(B).

The first partnership is [REDACTED] (formerly [REDACTED]) (EIN [REDACTED]). There are two partners in this partnership: [REDACTED] (a subsidiary and member of [REDACTED]'s ("parent") consolidated group) and [REDACTED] (a partnership).

The second partnership is [REDACTED] (EIN [REDACTED]). There are two partners in this partnership: [REDACTED] (a subsidiary and member of [REDACTED]'s consolidated group, [REDACTED]% partner) and [REDACTED] (parent and [REDACTED]% partner).

The third partnership is [REDACTED] (EIN [REDACTED]). There are three partners in this partnership: [REDACTED] (a subsidiary and member of [REDACTED]'s consolidated group, [REDACTED]% partner), [REDACTED] (a subsidiary and member of [REDACTED]'s consolidated group, [REDACTED]% partner), and [REDACTED] ([REDACTED]% partner and somehow associated with [REDACTED], formerly [REDACTED]).

DISCUSSION

The Taxpayer Relief Act of 1997 (TRA'97) amended section 6231(a)(1)(B)(i) to provide that partnerships with C corporation partners could fall under the small partnership exception to the TEFRA unified audit procedures (partnerships with 10 or fewer partners fall into the small partnership exception). Prior to TRA'97, the small partnership exception only applied to partnerships consisting of natural persons or estates. The amendment applies to partnership tax years ending after August 5, 1997.

As a result of the amendment, certain partnerships with 10 or fewer partners that used to be covered under the TEFRA procedures are now under the small partnership exception and TEFRA will not apply to the years ending after August 5, 1997. However, a small partnership can file an election for any taxable year to not be a small partnership, in which case the unified audit procedures under TEFRA will apply. I.R.C. § 6231(a)(1)(B)(ii). Once the election is made, it will apply for such year and for all subsequent taxable years unless revoked with the consent of the Internal Revenue Service.

There is an additional limitation to the small partnership

exception which is relevant to one of the partnerships at issue in this case. Temp. Treas. Reg. § 301.6231(a)(1)-1T(a)(2) provides that the small partnership exception "does not apply to a partnership for a taxable year if any partner in the partnership during that taxable year is a pass-thru partner." As relevant here, a "pass-thru partner" means a partnership. I.R.C. § 6231(a)(9). [REDACTED] (formerly [REDACTED]) has a partnership as one of the partners ([REDACTED]). Accordingly, even after the TRA'97 amendment, the [REDACTED] does not fall under the small partnership exception and is still a TEFRA partnership.¹ Therefore, the Form 872-P, signed by the TMP, is sufficient to protect the statute.

None of the partnerships at issue filed an election under section 6231(a)(1)(B)(ii) with the [REDACTED] or [REDACTED] tax returns. However, it is not too late for an election to be filed by [REDACTED] ("[REDACTED]") and [REDACTED] ("[REDACTED]") for the [REDACTED] taxable year.

Temp. Treas. Reg. 301.6231(a)(1)-1T(b)(2) provides as follows:

2) *Method of election.* A partnership shall make the election by attaching a statement to the partnership return for the first taxable year for which the election is to be effective. The statement shall be identified as an election under section 6231(a)(1)(B)(ii), shall be signed by all persons who were partners of that partnership at any time during the partnership taxable year to which the return relates, and shall be filed at the time (determined with regard to any extension of time for filing) and place prescribed for filing the partnership return. However, for partnership taxable years for which a partnership return is to be filed before 90 days after the date final regulations under this section are published in the Federal Register the partnership may file the statement described in the preceding sentence on or before the date which is one year before the date specified in section 6229(a) for the expiration of the period of limitations with

¹ The Temporary Regulations were only published on January 25, 1999, with an effective date of January 26, 1999. However, these regulations are "interpretive" regulations, and it is the Service's position that the provisions would apply to the taxable year [REDACTED]. Therefore, even though the "pass-thru partner" exception to the small partnership exception only appears in the temporary regulations published in 1999, the regulation will control as to the [REDACTED] taxable year. Moreover, a clear reading of the statute indicates that a partnership cannot be a partner in a small partnership; it is not an individual, corporation or estate. I.R.C. § 6231(a)(1)(B)(i).

respect to that partnership (determined with regard to extensions of that period under section 6229(b)).

Accordingly, since [REDACTED] is a taxable year for which a return was due prior to the regulations becoming final, so long as an election is filed more than one year before the expiration of the statute of limitations under section 6229(a), determined with regard to extensions under section 6229(b), the election will be valid. Therefore, prior to filing such election, it will be necessary to secure agreements to extend the statute of limitations for [REDACTED]. Since the TEFRA provisions do not apply to the small partnerships, the executed Forms 872-P are not effective.

A. Signatures required on statute extensions.

I.R.C. § 6501(a) is the general statute of limitations for assessing any tax imposed by the Internal Revenue Code. This general statute of limitations may be extended by agreement executed prior to the expiration of the time prescribed in the statute. I.R.C. § 6501(c)(4).

I.R.C. § 6629(a) provides that the period of limitations for assessing income tax with respect to any person which is attributable to a partnership item shall not expire until 3 years after the partnership return was filed or the last day for filing the return (determined without regard to extensions), whichever is later. Section 6229(a) is not a separate statute of limitations, but in effect provides for the non-expiration of the section 6501(a) statute with respect to partnership items; section 6229(a) can only add to the limitations period of section 6501(a), it cannot reduce that period. Rhone-Poulenc Surfactants and Specialties, L.P., GAF Chemicals Corp., A Partner other than the Tax Matters Partner v. Commissioner, 114 T.C. 533 (2000).

Section 6229(b)(1)(A) provides that the period described under section 6229(a) may be extended, with respect to any partner, by an agreement entered into by the Service and such partner. However, section 6629(b)(3) provides that any agreement under section 6501(c)(4) shall extend the period for imposing any tax with respect to a partnership item (i.e., section 6229(a)) only if the agreement expressly provides that such agreement applies to the tax attributable to partnership items.

Under Treas. Reg. § 1.1502-77(a), the common parent is the sole agent for each subsidiary in the group, as to all matters relating to the tax liability for the consolidated return year. Moreover, with exceptions not relevant here, a subsidiary does

not have the authority to act for or represent itself in any such matters. The common parent must sign all extensions of time, and would be the proper party to sign an extension under section 6501(c)(4). A waiver given by the common parent extending the assessment statute is applicable to each corporation that was a member of the group during any part of that taxable year. Treas. Reg. § 1.1502-77(c). The partnership adjustments affect the tax liability of the consolidated group. Accordingly, under Treas. Reg. § 1.1502-77(a), the common parent would be the party required to sign the section 6501(c)(4) extension, albeit with the special language required to have the agreement apply to partnership items.²

Assuming that a Form 872³ is to be used to extend the statute, the following special language should be included in the agreement:

Without otherwise limiting the applicability of this agreement, this agreement also extends the period of limitations for assessing any tax (including additions to tax and interest) attributable to any partnership items (see § 6231(a)(3)), affected items (see § 6231(a)(5)), computational adjustments (see § 6231(a)(6)), and partnership items converted to non-partnership items (see § 6231(b) that are determined with respect to any member of this consolidated group).⁴ This agreement extends the period

² There is still an apparent conflict between the provisions of section 6229(b)(1)(A) and Treas. Reg. § 1.1502-77. The Service's victory in Rhone-Poulenc, in which it was held that the only statute of limitations is under section 6501, which statute may be extended, but not shortened, by section 6229(a), has not been tested by the United States Circuit Court of Appeals. Being extremely conservative, and to avoid any conflict, it would be prudent to have the statute extensions signed both by someone authorized to act on behalf of the subsidiary, and by the common parent as agent for the subsidiary. If you are securing both signatures for an election to be out of the small partnership exception, see discussion below, it may be prudent to get both signatures on the agreements to extend the statute of limitations.

³ Further extensions of time to assess, if necessary, must be similarly obtained from the partners. This is so even if the partners properly elect, as discussed below, to have the TEFRA provisions apply.

⁴ The underlined language is in addition to that suggested by the TEFRA Technical Advisor (Mark Ransick), and was only underlined so you could readily see the difference. This

for filing a petition for adjustments under § 6228(b) but only if a timely request for administrative adjustment is filed under § 6227. For partnership items which have converted to non-partnership items, this agreement extends the period for filing a suit for refund or credit under § 6532, but only if a timely claim for refund is filed for such items. In accordance with paragraph (1) above, an assessment attributable to a partnership shall not terminate this agreement for other partnerships or for items not attributable to a partnership. Similarly, an assessment not attributable to a partnership shall not terminate this agreement for items attributable to a partnership.

The signature block for the common parent's signature should look like this:

****, as parent on behalf of ***** by [name],
President

B. Signatures required on election.

The election to remove a partnership from the small partnership exception to TEFRA is to be made by filing a statement that is signed by all persons who were partners of that partnership at any time during the partnership taxable year to which the return relates. Temp. Treas. Reg. § 301.6231(a)(1)-1T(b)(2).

Again, there is a conflict between the partnership regulations, which require all partners to act, and the consolidated return regulations which make the parent the sole authority to act on behalf of a subsidiary. This tension is even more significant than in the statute extension question since there is no argument that another non-TEFRA partnership statutory provision applies (e.g., section 6501).

The consolidated return regulations provide as an example of the common parent's authority that "any election available to a subsidiary corporation in the computation of its separate taxable income must be made by the common parent" Treas. Reg. § 1.1502-77(a). The election under Temp. Reg. § 301.6231(a)(1)-1T(b) can possibly be viewed as a matter relating to the tax liability for the consolidated return year inasmuch as it relates to the income of a member that is a partner in the partnership and thus relates to the group's consolidated tax liability. Therefore, the position can be taken that the common parent would

language should not be underlined when the statute extension is typed.

be the member-partner's agent for purposes of making the election.

However, this position has never been tested in litigation and there are strong countervailing arguments that the election is not directly related to the tax liability for the consolidated return year and therefore is not within the scope of the common parent's authority as agent for the subsidiaries. For that reason, have all partners, as well as their common parent, if any, sign the election. If this is not possible, we believe it would be defensible in this case to have the common parent sign as agent for each subsidiary-member. If only the common parent (and not the subsidiary) signs the election, we would recommend expressly indicating that the common parent is signing "on behalf of" the named subsidiaries. In that way, even if a court were to determine that the common parent was not the subsidiaries' agent under § 1.1502-77(a), we might still be able to argue under general agency principles that the common parent was signing as the subsidiaries' agent.

Please call Donna Leone at 412-644-3442 if you have any questions.

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By: _____
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